U.S. SUPREME COURT CASES TO BE ARGUED IN 2009

Summaries of Cases Granted Review by the NAAG Supreme Court Project,

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CRIMINAL LAW - CRIMINAL PROCEDURE

CRIMINAL LAW - CAPITAL/HABEAS

CRIMINAL LAW - FEDERAL STATUTES AND RULES

FIRST AMENDMENT

§ 1983 AND *BIVENS* ACTIONS

MISCELLANEOUS - CONSTITUTIONAL CASES

● *Maryland v. Shatzer, 08-690.* The Court will decide whether the Edwards v. Arizona, 451 U.S. 477 (1981), prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel is inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time before the suspect is reinterrogated pursuant to Miranda. In 2003, Detective Shane Blankenship began investigating the claim that respondent Michael Shatzer exposed himself to his son. On August 7, 2003, Detective Blankenship met with Shatzer in prison (where Shatzer was being held on a different sex offense charge), and read him his Miranda rights. Shatzer told the detective that he did not want to talk about the case (involving his son) without an attorney present. Detective Blankenship asked Shatzer to contact him when he obtained an attorney, and the interview ended. The case apparently stalled at that point, but in 2006 a new investigation of the son's allegation commenced. On March 2, 2006, Detective Paul Hoover interviewed Shatzer, unaware that Shatzer had requested an attorney when he met with Detective Blankenship two and a half years earlier. Shatzer waived his Miranda rights, spoke with Detective Hoover for half an hour, agreed to take a polygraph test, and then confessed to having masturbated in front of his son during the test. Three months later, the state charged Shatzer with various offenses related to his sexual abuse of his son. Prior to trial, Shatzer moved to suppress inculpatory statements he made to police during and following his meeting with Detective Hoover. The trial court denied the motion, and Shatzer was found guilty of several offenses. The Maryland Court of Appeals reversed. 954 A.2d 1118.

The Maryland Court of Appeals held that "the passage of time alone is insufficient to expire the protections afforded by Edwards." The court declined to rule on "whether a break in custody would vitiate the Edwards presumption" because, in its view, Shatzer's re-release into the prison population on an unrelated charge did not constitute a break in government custody. The court therefore ruled that the bright-line Edwards rule applied and the police could not initiate questioning and seek a waiver in order to interrogate the suspect on the same sexual offense crime two-and-a-half years later. In its petition, Maryland argues that a break in custody and expiration of a substantial amount of time vitiate the concern addressed in Edwards that police may attempt to badger the suspect. "After a substantial period of time, . . . the presumption that the defendant wishes to proceed only in the presence of counsel is not reasonable." By giving a suspect the Miranda warnings, police allow the suspect to "determine whether time has changed his desire to be questioned only in the presence of counsel." Maryland therefore proposes a "good faith" test of police conduct that asks whether "the interrogators conspired to avoid the requirements of Miranda by delaying an interrogation." In opposition, Shatzer argues that there was no break in custody in this case because he remained in the government's custody when he returned to prison, and "[n]othing about [his] circumstances had changed such that his original choice to deal with police investigators only through counsel should no longer have been honored."

● *Padilla v. Kentucky, 08-651.* The Court will decide whether an attorney can be found ineffective under Strickland v. Washington, 466 U.S. 668 (1984), for wrongly advising his client on the "collateral consequences" of pleading guilty. Petitioner Jose Padilla is not an American citizen, even though he has lived in the United States for several decades. He was indicted on four counts of drug possession, trafficking, and operating unregistered machinery. With the advice of appointed counsel, Padilla pleaded guilty to the three drug counts, in exchange for the dismissal of the remaining count and a 10-year sentence, five of which would be served on probation. According to Padilla, counsel wrongly him that, due to his extended stay in the United States, he could not be deported under the Immigration and Nationality Act if he pleaded guilty. As it turns out, under recent amendments to the federal immigration laws, deportation is mandatory for the offenses to which Padilla pled guilty. And shortly after Padilla's plea, he was served with an immigration detainer lodged by his prison. Padilla filed a state post-conviction to withdraw his guilty plea due to ineffective assistance of counsel. The trial court denied Padilla's requests for an evidentiary hearing and his request to withdraw his guilty plea. The Kentucky Court of Appeals reversed, holding that Padilla was entitled to an evidentiary hearing. The state appealed, and the Kentucky Supreme Court reversed, holding that Padilla was not entitled to an evidentiary hearing or to withdraw his guilty plea. Relying on its own recent precedent, the Kentucky Supreme Court held that "[a]s collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel, it follows that counsel's failure to advise [Padilla] of such collateral issue or his act of advising [Padilla] provides no basis for relief." Because it held that Padilla had no Sixth Amend-ment right to effective advice on "collateral consequences," the court held that Padilla had no basis to withdraw his guilty plea. 253 S.W.2d 482.

In his petition, Padilla attacks the state court's opinion on two grounds, both of which have created a split among the lower courts. First, Padilla argues that the Court should not treat mandatory deportation under the INA as a "collateral consequence of a criminal conviction which relieves counsel from any affirmative duty to investigate and advise." Second, Padilla argues that, if deportation is considered a "collateral consequence" of a guilty plea, "gross misadvice" concerning deportation should be considered ineffective assistance of counsel warranting withdrawal of the plea. Padilla asserts that the Kentucky Supreme Court's holding conflicts with Hill v. Lockhart, 474 U.S. 52 (1985), "which held that ineffective-assistance claims regarding advice on the collateral consequence of parole eligibility must be analyzed under" Strickland. Kentucky responds by arguing that the Sixth Amendment does not require counsel to give "any advice" on collateral consequences. Accordingly, there cannot be a cognizable Strickland claim for the failure to give advice, or for the giving of faulty advice, concerning a collateral consequence.

● *Graham v. Florida, 08-7412.* At issue is whether the Eighth Amendment's prohibition on cruel and unusual punishment precludes sentencing a juvenile to life imprisonment without possibility of parole for commission of an offense other than

homicide. When Terrance Graham was 16 years old, he took part in a robbery of a restaurant during which one of his accomplices beat the manager with a steel bar. He pled guilty to armed burglary with assault or battery, a first-degree felony eligible for a life sentence, and attempted armed robbery, in return for the court withholding adjudication and sentencing him to three years probation and 12 months in the county jail. After his release from jail, Graham was arrested on charges of home invasion robbery and eluding arrest after he and two friends forced their way into a home, held a gun to the home-owner's head while his friends searched the house, and fled from the police. At his probation violation hearing, the court found that he had violated several conditions of his probation and sentenced him to life imprisonment without possibility of parole. The court reasoned that he had been offered a rare second chance when he had received probation for a crime for which he could have been sentenced to life in prison, that he had rejected that chance and thereby demonstrated that he could not be deterred or rehabilitated, and that the court must act to protect the community. The First District Court of Appeal upheld the sentence, rejecting Graham's arguments that the sentence was per se invalid under Roper v. Simmons, 543 U.S. 551 (2005) (holding that death penalty could not constitutionally be imposed on juveniles), and because it was contrary to international norms. The court also rejected Graham's as-applied challenge, finding that the sentence was not grossly disproportionate to his offense and did not violate the United Nations International Covenant on Civil and Political Rights. 982 So. 2d 43. The Florida Supreme Court declined discretionary review.

Graham argues that the principles underlying Roper should be extended to life sentences without possibility of parole in cases where the defendant has not committed a homicide. In support of this contention, he points to the near universal rejection of such sentences by the international community, particularly as embodied by the United Nations Convention on the Rights of the Child (CRC), although he acknowledges that the United States (along with Somalia) has not ratified the CRC. He also argues that there is a national consensus in the United States against such sentences for juveniles, noting how infrequent such sentences are and that, of the 2,225 juvenile offenders serving life sentences without possibility of parole, only seven percent were convicted of non-homicide crimes. Finally, he notes the lack of a uniform approach among the states in dealing with these cases and suggests that a life without parole sentence for such a juvenile offender is "inhumane." Florida responds that Roper should not be extended because, like most Supreme Court Eighth Amendment jurisprudence, it rests on the notion that "death is different." The state also argues that the alleged lack of uniformity among states is largely the result of independent state law grounds and that the weight of precedent supports the view that the sentence is not grossly disproportionate to Graham's offense.

● *Sullivan v. Florida, 08-7612.* This case raises a very similar issue to the one raised in Graham v. Florida: whether the Eighth Amendment bars the imposition of a sentence of life without parole on a 13-year-old for a crime other than homicide. In 1989, at the age of 13, Joe Sullivan participated in the burglary of an empty home; he then returned in the afternoon and sexually assaulted the woman who lived there. He was tried as an adult,

convicted of two counts of sexual battery, two counts of burglary, and one count of grand theft, and was sentenced to life without parole. Sullivan's first motion for post-conviction relief was denied in 1996. Then, after the Court held in Roper v. Simmons that the Eighth Amendment barred execution of a person for crimes committed as a juvenile, Sullivan filed a second motion for post-conviction relief. Under Florida law, a court may hear an untimely motion if "the fundamental constitutional right asserted was not established within the period provided for [in the rules] and has been held to apply retroactively." Sullivan argued that, under Roper, his sentence of life without parole violated the Eighth and Fourteenth Amendments. The district court held that Roper did not establish the constitutional right asserted and, therefore, denied his motion as untimely. The First District Court of Appeal summarily affirmed without an opinion, thereby foreclosing review by the Florida Supreme Court.

Sullivan argues that his sentence is "freakishly rare" and, thus, paradigmatically "unusual." He notes that he is one of only two 13-year-olds sentenced to life without parole for non-homicide crimes, that no 13-year-old child has been given such a sentence for a non-homicide in 15 years, and that only eight 13-year-olds have received the sentence for any crime. He also argues that, as Roper recognized, there are significant differences between juveniles and adults that are "highly relevant to determinations of culpability," and that "psychosocial research confirms that younger teenagers are less developed than older adolescents in areas directly related to criminal culpability." Florida's Brief in Opposition argues that, because Roper did not establish a constitutional right of 13-year-olds not to be sentenced to life without parole, the Florida court properly applied the procedural bar to considering his motion.
urisprudence, it rests on the notion that "death is different." The state also argues that the alleged lack of uniformity among states is largely the result of independent state law grounds and that the weight of precedent supports the view that the sentence is not grossly disproportionate to Graham's offense.

● *Florida v. Powell, 08-1175.* The Court will decide whether a defendant is sufficiently advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), when he is informed of the right to talk to a lawyer before police questioning but is not expressly informed of the right to have a lawyer present during questioning. Respondent Kevin Dewayne Powell was one of four adults present at an apartment belonging to Powell's girlfriend when she consented to its search by Tampa police. After the police found a gun under a bed, they arrested Powell for being a felon in possession of a firearm. Police read Powell a Miranda advisement that stated, in relevant part, that Powell had "the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview." Powell agreed to talk and admitted he bought the weapon "off the street" for $150. At trial, the court permitted police to testify about Powell's statement over a defense objection that Powell had been inadequately Mirandized. Powell then testified in his own defense and asserted he did not know the gun was present at the apartment because he only infrequently resided there. Powell was

convicted and sentenced to 10 years in prison. A Florida District Court of Appeal overturned the conviction, holding that the police did not adequately convey to Powell that he was allowed to have a lawyer with him during questioning. The Florida Supreme Court affirmed. 998 So. 2d 531.

Florida urges the Court to resolve a federal circuit and state court split on how explicit police must be that an attorney may be present at all times during questioning. The state argues that the prophylactic Miranda warnings are not themselves constitutionally protected rights, but rather are measures set out to protect against compulsory self-incrimination. For that reason, reviewing courts need not examine Miranda warnings "as if construing a will or defining the terms of an easement." And Florida points to Duckworth v. Eagan, 492 U.S. 195 (1989), where the Court held that Miranda does not require a rigid and precise formulation of the warnings given a criminal defendant; the inquiry is merely whether the warnings "reasonably convey" to a suspect his or her rights. Powell responds that Miranda unequivocally states that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and have the lawyer with him during interrogation." The Florida Supreme Court's decision simply mirrored that language. According to Powell, the actual advisement read to him was misleading because the statement "the right to talk to a lawyer before answering" conveys that a limited right to an attorney exists that terminates upon answering.

● *Briscoe v. Virginia, 07-11191.* At issue in this follow-up to Melendez-Diaz v. Massachusetts, 547 U.S. ___ (2009), is the constitutionality of Virginia's variant of a "notice and demand" statute. In Melendez-Diaz, the Court held that an affidavit reporting the results of a state drug lab's analysis is "testimonial," and that a criminal defendant is therefore entitled under the Confrontation Clause to cross-examine the drug analyst who prepared the affidavit. The Court also held, however, that basic "notice and demand" statutes — which "require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which a defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial" — are constitutional. Virginia law does not, on its face, give a defendant the power to demand that the prosecution present the analyst as part of the prosecution's case-in-chief. Rather, Virginia law provides that, when "a certificate of analysis is admitted into evidence" at trial, the defendant "shall have the right to call the person performing such analysis or examination . . . and examine him in the same manner as if he had been called as an adverse witness." Va. Code §19.2-187.1. Petitioners are two defendants who were convicted of charges related to the distribution of cocaine. In both their trials, the prosecution introduced certificates of analysis prepared by Virginia's Department of Criminal Justice Services which stated that the seized substances contained large quantities of cocaine. Petitioners objected to the introduction of the certificates, arguing that it would violate the Confrontation Clause. The trial courts overruled the objections and admitted the certificates. Neither petitioner called the analyst as his own witness. The Virginia Court of Appeals affirmed their convictions, and the Virginia Supreme Court affirmed in a consolidated decision. 657 S.E.2d 113.

The Virginia Supreme Court held that the Virginia procedure gives defendants all that the Confrontation Clause requires, namely, "the elements of confrontation — physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." The court rejected petitioners' contention that "this statutory procedure impermissibly burdens the exercise of their right under the Confrontation Clause by requiring them to take affirmative steps in order to assert their right." The court observed that states have adopted various procedural rules governing the assertion of constitutional rights, and that §19.2-187.1 gives defendants "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court." The court also rejected petitioners' "claim that the statutory procedure . . . shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness." The court held that "[t]his argument is not cognizable under the Confrontation Clause." Rather, it raises due process concerns that petitioners waived by not invoking the procedures set forth in §19.2-187.1. Petitioners argue in their petition that state high courts are divided on the issue, and that the Virginia Supreme Court erred on the merits. In petitioners' view, the Confrontation Clause "govern[s] the process for witnesses against the accused" and imposes a burden of production on the prosecution, not the defense. To hold otherwise, argue petitioners, would conflate the Confrontation Clause with the Compulsory Process Clause, "which allows the accused to bring to trial witnesses 'in his favor.'" Petitioners contend that there is a significant difference between being allowed to cross-examine a prosecution witness and being allowed merely to call and impeach one's own witness. In the latter situation, substantial time may have passed since the prosecution introduced the certificate of analysis into evidence; "calling to the stand a witness whose statement has already been admitted may be annoying to the trier of fact and may appear to be harassment of the witness"; the defense might have to "disrupt its own case if it wishes to examine the technician"; and the defendant has no opportunity to cross-examine the technician while "still decid[ing] not to present an affirmative case."

● *McDaniel v. Brown, 08-559.* At issue is the standard and process by which a federal habeas court, applying AEDPA, should assess a sufficiency-of-the-evidence claim under Jackson v. Virginia, 443 U.S. 307 (1979). Respondent Troy Brown was convicted by a jury of two counts of sexual assault on his nine-year-old niece, Jane, as well as one count of abuse. Jane's mother, Pam, was at the Peacock Bar when the rape occurred. Shortly before 1 a.m., Jane called Pam at the bar and told her that a man had come to their trailer and hurt her. Troy Brown had been at the bar with Pam, but there was conflicting trial testimony regarding when he left. Pam said she last saw him between 11 p.m. and midnight; one bartender stated that he left the bar by 12:20 a.m.; and another bartender said she saw Brown at the bar at 1:30 a.m. Jane testified that her assailant had a mustache, wore dark jeans and a black jacket, wore boots, and smelled of "beer or puke," all of which were consistent with Brown's appearance that night. On the other hand, Jane also testified that the assailant's jacket had "a zipper for sure"; Brown's jacket was zipperless. And certain evidence pointed to Brown's brother, Trent, who was Pam's ex-husband. At trial, the prosecution presented a DNA expert (Renee Romero) who testified that Brown's DNA matched the DNA found in Jane's underwear, and that 1 in 3,000,000

people randomly selected from the population would also match that DNA. Romero then put it another way: that there was a 99.99967 percent chance that the DNA found in Jane's underwear was from Brown's blood. Romero also testified that there was only a 1 in 6,500 chance that one of Brown's brothers would match his DNA at all five loci.

The Nevada Supreme Court denied Brown's challenge to his conviction on both direct and post-conviction review. Brown then filed a federal habeas petition. The district court allowed Brown to expand the record, which he did by introducing a DNA expert's report (the Mueller Report) that contested much of Romero's testimony. The district court concluded that Romero's testimony was unreliable and that, absent her testimony, no rational trier of fact could have concluded beyond a reasonable doubt that Brown was guilty. The court therefore granted habeas relief under Jackson v. Virginia. A divided panel of the Ninth Circuit affirmed. 525 F.3d 787. The Ninth Circuit held, first, that the Nevada Supreme Court's decision was "contrary to" Jackson because the court looked to what a "reasonable" jury would do, not a "rational" jury, and because the court assessed Brown's guilt wholesale, rather than assessing "the essential elements of the crime." The Ninth Circuit held, secondly, that the Nevada Supreme Court's decision was an "unreasonable application of" Jackson. The court stated that the Mueller Report was unchallenged, and that it showed that (1) Romero erred when she stated there was a 99.99967 percent chance that the DNA found in Jane's underwear was from Brown's blood, and (2) the odds that one of Brown's brothers would have matched the DNA might have been as high as 1 in 66 (as opposed to Romero's assertion that the odds were 1 in 6,500). Turning to the rest of the evidence, the court stated that "it is [the state's] burden to establish guilt beyond a reasonable doubt for each and every element of the offense, a burden that [the state] ha[s] not carried here." The court pointed to the dispute as to when Brown left the bar; the conflict between aspects of Jane's description of her attacker and Brown's appearance that night; the fact that Jane twice identified Trent as her assailant; testimony by Brown's roommate that he did not see blood on Brown's boots that night; and testimony by an officer that he saw no marks on Brown's hands or blood on his clothing the next morning.

In its petition, the state attacks the Ninth Circuit's decision on a variety of fronts. First, the Ninth Circuit misapplied Jackson by expanding the evidence and considering non-record evidence, and by reweighing the evidence and considering it in a light favorable to the defense. As Judge O'Scannlain's dissent explained, "the disputed facts . . . should have been viewed in the light most favorable to the government," and "considerable circumstantial evidence" pointed to Troy. In addition, just because Romero's presentation was flawed did not mean that no weight should have been given to the DNA evidence. Even under the Mueller Report, "it was extremely unlikely that a random person committed the crime" and there was only a 1 in 132 chance that Trent's DNA would have matched. Second, the Ninth Circuit erred because Brown never raised a claim in state court that the DNA evidence was unreliable. Third, under Woodford v. Visciotti, 537 U.S. 19 (2004), the Ninth Circuit erred by failing to presume that the Nevada Supreme Court applied the appropriate legal standard. Fourth, the Ninth Circuit's statement that "it is [the state's] burden to establish guilt beyond a reasonable doubt for each and every element of the

offense" is a new standard that federal habeas courts may not impose under 28 U.S.C. §2254(d). Finally, the Ninth Circuit erred because Brown "failed to develop the factual basis of [his] claim in State court proceedings," and was therefore barred by 28 U.S.C. §2254(e)(2) from supplementing the proceedings on federal habeas. In opposition, Brown argues that the prosecution "conceded the insufficiency of the DNA evidence" and conceded that "but for the DNA there was reasonable doubt." Brown further argues that he did present to the state courts his sufficiency of the evidence claims based on the reliability of the DNA evidence presented at trial.

● *Smith v. Spisak, 08-724.* The Court will address whether the Sixth Circuit violated AEDPA when it granted habeas relief based on Mills v. Maryland, 486 U.S. 367 (1988), and United States v. Cronic, 466 U.S. 648 (1984). Respondent Frank Spisak murdered three men, and shot a fourth man seven times, during a series of shootings in 1982. Spisak is an avowed member of the "American Nazi Party" and acknowledged his lack of remorse for the killings. At Spisak's capital murder trial, his counsel acknowledged during the guilt and penalty phases that Spisak committed the murders, but argued that the murders were the products of severe mental illness. During his penalty-phase closing argument, counsel detailed the heinousness of Spisak's crimes before arguing in mitigation that the crimes were a result of Spisak's mental makeup, which he described as "sick," "twisted," and "demented." The trial court then instructed the jury that

> [I]f after considering all of the relevant evidence raised at trial, the evidence and the testimony received at this hearing and the arguments of counsel, you find that the State failed to prove beyond a reasonable doubt that the aggravating circumstances which the defendant, Frank G. Spisak, Jr., has been found guilty of committing in the separate counts outweigh the mitigating factors, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

In the end, each juror signed a verdict form that recommended a sentence of death. His convictions and sentence were affirmed on direct appeal and post-conviction appeal by the Ohio state appellate courts.

Spisak filed a habeas petition that raised two claims relevant here. First, Spisak claimed that the state courts erred in not finding that counsel's comments concerning the vile nature of his crime during his penalty phase closing argument violated Strickland v. Washington. The district court rejected this claim by holding that counsels' argument "can easily be attributed to a trial strategy" of blunting the prosecution's eventual depiction of the crime and bolstering his mitigation argument that he suffered from mental deficiencies. Second, Spisak claimed that the trial court's penalty phase instruction, combined with its jury verdict form, required jury unanimity in sentencing without describing the consequences of a non-unanimous vote. The district court found this argument precluded by Jones v. United States, 527 U.S. 373 (1999). The Sixth Circuit reversed on both issues. Relying on its own precedent, which itself relied on Cronic, the court determined that

counsel's "extremely graphic and overly descriptive" closing argument amounted to deficient performance and that, absent the remarks, "a reasonable probability exists that at least one juror would have reached a different conclusion about the appropriateness of death." The court also ruled that the trial court's jury instruction and verdict forms violated Mills v. Maryland because (1) the court did not explicitly inform jurors that they need not unanimously find the existence of mitigating circumstances, (2) the court did not explicitly inform jurors that they need not unanimously reject a death sentence before imposing a life sentence, and (3) the verdict forms required signatures from all 12 jurors.

The Supreme Court granted Ohio's initial cert petition, vacated the lower court's judgment, and remanded the case back for further consideration in light of its opinions in Carey v. Musladin, 127 S. Ct. 649 (2006), and Schriro v. Landrigan, 127 S. Ct. 1933 (2007), each of which reversed lower court opinions granting habeas relief under AEDPA on sets of facts that had not been addressed by "clearly established" precedent from the Court. Without further briefing from the parties, the Sixth Circuit issued a four-page opinion reinstating its prior opinion. In its second petition, Ohio argues that the Sixth Circuit violated AEDPA on the ineffective-assistance claim because the court of appeals wrongly applied the presumed prejudice rule of Cronic, instead of applying Strickland as the state courts did. As for the jury instruction and verdict form claim, Ohio argues that the type of instructions in this case were not addressed by the Court in Mills v. Maryland, which dealt with a jury instruction that led jurors to believe that the existence of an individual mitigating factor must be found by all 12 jurors before any juror could consider the mitigating factor in the weighing process. Because Mills addressed a different set of facts than the ones presented in this case, Ohio argues that the Sixth Circuit's opinion runs afoul of the Court's recent AEDPA reversals in Musladin and Landrigan.

● *Beard v. Kindler, 08-992.* The Court will decide whether a state procedural rule is rendered "inadequate" under the adequate-state-grounds doctrine — and therefore unenforceable on federal habeas corpus review — because the state rule is discretionary rather than mandatory. Respondent Joseph Kindler committed murder and was given the death sentence in Pennsylvania state court. Before the sentence was formally imposed, Kindler filed post-verdict motions with the assistance of new counsel. Kindler then broke out of prison, twice. Before his recapture in Canada years later, the trial court exercised its discretion under a state fugitive waiver rule to dismiss Kindler's post-verdict motions. The state appellate courts upheld the resulting procedural bar. On federal habeas review, the district court held that the state procedural ground was "inadequate" to bar habeas review, and therefore reached the merits of Kindler's claims. The court granted sentencing relief under Mills v. Maryland, 486 U.S. 367 (1988), but rejected the balance of the claims. The parties cross-appealed. The Third Circuit affirmed the denial of procedural default because the state's fugitive waiver rule permitted discretion in reinstating post-verdict motions following a fugitive's recapture. According to the court, the exercise of that discretion meant the rule was not firmly established and therefore not an independent and adequate procedural rule. Turning to the merits, the Third Circuit upheld the district court's

vacatur of Kindler's death penalty and added other grounds for sentencing relief. 542 F.3d 70.

In its petition, the state argues that the mere existence of discretion should not render a state rule inadequate. According to the state, the essence of discretion is that it exists on a spectrum; some imprecision in the use of discretion is tolerable to encourage equitable treatment under varying and difficult facts. The better question in this context, argues the state, is whether a state discretionary rule provides the defendant adequate notice and opportunity to conform his conduct to it. By contrast, the Third Circuit's approach — under which a state procedural rule cannot be honored under adequate-state-grounds doctrine when it cannot be consistently or strictly applied — all but vitiates the long-standing habeas doctrine of procedural default. And it "subvert[s] common, useful tools of judicial flexibility, such as plain error and miscarriage of justice, and invite[s] federal courts to second-guess, in the smallest detail, the state courts' application of their own procedural rules." Kindler's opposition brief complains the state misreads the Third Circuit's holding, which (in his view) simply found that the procedural rule applied to Kindler was a new and different rule from the one existing at the time of his alleged default.

● *Wood v. Allen, 08-9156.* At issue in this capital case is whether the Eleventh Circuit erred when it denied habeas relief based on its deference to the facts found by the state courts with respect to petitioner's claim of ineffective assistance of counsel. The case began in 1993 when petitioner Holly Wood snuck into his former girlfriend's residence and shot her while she slept. An Alabama jury convicted Wood of capital murder during a first-degree burglary, and the trial judge sentenced Wood to death. Alabama appellate courts affirmed Wood's conviction and death sentence. In 1999, Wood filed a post-conviction relief petition which (after amendments) asserted, inter alia, that Wood's trial attorneys were constitutionally ineffective at sentencing for failing to adduce mitigation evidence of his mental deficiencies. The post-conviction court denied Wood's petition after two evidentiary hearings, and again after a remand. The state appeals court affirmed. Wood then filed a federal habeas petition, which the district court granted with respect to his claim that his counsel was ineffective at the sentencing stage by failing to investigate his mental condition and present evidence of his mental deficiencies as mitigating evidence. A divided panel of the Eleventh Circuit reversed the habeas grant on the ineffectiveness claim. In particular, the Eleventh Circuit held that the state court was not objectively unreasonable in concluding that Wood's defense counsel acted strategically (and not negligently) when they (1) did not introduce the report of their psychological expert (Dr. Kirkland), which revealed that Wood suffered from some mental deficiencies, (2) did not further investigate his mental health problems, and (3) did not argue to the jury that Wood suffered from mental health problems. 542 F.3d 1281.

Wood's petition argues that the Eleventh Circuit erred in deferring to that state court conclusion. As a methodological matter, Wood asserts that the circuits are in conflict over how to apply the two subsections of AEDPA that impose deferential standards of review of state court factual findings, 28 U.S.C. §§2254(d)(2) and (e)(1). Section 2254(d)(2)

permits federal habeas courts to grant relief where the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Meanwhile, §2254(e)(1) provides that a "determination of a factual issue made by a State court shall be presumed to be correct," and "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Wood argues that whereas some circuits apply §2254(e)(1) only where evidence outside the state-court record has been presented, other circuits (including the Eleventh Circuit here) apply §2254(e)(1) even where the petitioner's challenge is based solely on the state court record. In Wood's view, the Eleventh Circuit erred by reviewing the state-court factual determinations under the "clear and convincing" standard of §2254(e)(1), and should instead have asked only whether the state court made "an unreasonable determination of the facts" under §2254(d)(2). The state counters that the Eleventh Circuit made only a passing reference to the "clear and convincing" standard in a footnote, and did not rely on it. The state further argues that the Court held in Miller-El v. Cockrell, 537 U.S. 322, 341 (2003), that §2254(e)(1) applies to the assessment of state-court factual findings, whereas §2254(d)(2) applies to assess state court decisions.

Wood next argues that habeas relief is warranted under §2254(d)(2) because "the state court finding that counsel made a strategic decision is contradicted by trial counsel's own admission that they failed to investigate Mr. Wood's mental health problems." Wood points to memoranda written by one of Wood's counsel to his co-counsel before sentencing by the judge which stated that "we should request an independent psychological evaluation — even if that means asking for a postponement of the sentencing hearing [before the judge]." Wood argues that counsel did not make that request because they did not believe the judge would grant the continuance, which confirms that counsel failed to conduct the necessary investigation previously. Accordingly, and contrary to the Eleventh Circuit's opinion, "the state court record cannot be characterized as 'silent' as to why evidence of Mr. Wood's 'mental deficiencies was not presented to the jury in the penalty phase.'" The state counters that "Wood's trial counsel . . . conducted a reasonable penalty phase investigation and obtained a wealth of evidence that they presented on his behalf at the penalty phase of his trial." The state faults Wood's state post-conviction counsel for not asking his trial counsel "why they decided not to present evidence of his low intelligence at his trial" and "why they decided not to call Dr. Kirkland as a witness or introduce his report." As a consequence, the state court record is silent on those issues, which is insufficient to disprove the presumption that counsel "exercised reasonably professional judgment."

● *Johnson v. United States, 08-6925. The* Court will determine whether a state conviction for simple battery, which does not categorically trigger the state's sentencing enhancement for a "forcible felony," may nonetheless constitute a "violent felony" for sentence enhancement purposes under the federal Armed Career Criminal Act (ACCA). Petitioner Curtis Johnson was convicted of possession of ammunition by a convicted felon. 18 U.S.C. §922(g). Johnson was sentenced to 185 months imprisonment under ACCA

because the district court determined that he possessed three prior "violent felonies," which is defined to include any crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. §924(e)(2)(B)(i). One of Johnson's three prior felonies was a conviction for battery under Florida state law. Under Florida law, a battery occurs "when a person actually and intentionally touches or strikes another person against the will of the other; or intentionally causes bodily harm to another." Fla. Stat. §784.03(1)(a). In 2007, the Florida Supreme Court held that its battery statute does not invariably involve enough force to categorically trigger Florida's violent career criminal statute. Florida v. Hearns, 961 So. 2d 211 (Fla. 2007). On appeal to the Eleventh Circuit, Johnson argued that the Hearns decision foreclosed the use of his state battery conviction under ACCA because, if the Florida state court determined that Florida battery did not constitute a "forcible felony" under Florida law, then federal courts could not determine that a Florida battery constituted a "violent felony" under ACCA. The Eleventh Circuit rejected this argument and affirmed Johnson's sentence. 528 F.3d 1318.

The Eleventh Circuit noted that Florida's decision that a state battery conviction was insufficient to trigger the state's career criminal statute had no effect on the question whether the same conviction fit within the federal career criminal statute. The court then held that "the touching or striking element in the Florida crime of battery satisfies the physical force requirement of [ACCA]." The Court granted certiorari review over two of three questions presented in Johnson's petition. First, Johnson argues that the Florida court's determination that simple battery does not categorically involve "physical force or violence" is binding on federal courts, which therefore cannot use a Florida battery conviction under ACCA. Second, Johnson argues that "de minimis touching," as opposed to physical force that is "violent in nature," is actionable under Florida's battery statute and falls outside the scope of a "violent felony" under ACCA.

● *Bloate v. United States, 08-728.* At issue is whether pretrial motion preparation is an excludable delay in federal speedy-trial calculations under the Speedy Trial Act of 1974 (STA), 18 U.S.C. §3161 et seq. The STA requires that a criminal defendant be tried within 70 days of indictment or the defendant's first appearance in court, whichever is later. Subsection 3161(h)(1) lists eight categories of delays "resulting from other proceedings concerning the defendant" that do not count toward the 70-day limitation. Among them are delays "resulting from other proceedings concerning the defendant, including but not limited to . . . delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Id. §3161(h)(1)(D). On August 24, 2006, the United States indicted petitioner Taylor Bloate for being a felon in possession of a firearm and possession of cocaine with intent to distribute. On September 7, 2006, Bloate moved for and was granted a 13-day extension for filing pretrial motions; on October 4, 2006, a magistrate judge granted Bloate leave to waive the right to file pretrial motions. Several months later, and two weeks before his trial was set to begin, Bloate filed a motion to dismiss the indictment under the STA. The district court denied the motion based on a calculation that, inter alia, excluded the 28 days

allocated to the preparation of a pretrial motion (September 7 to October 4). Following a jury trial resulting in conviction, Bloate appealed to the Eighth Circuit, which affirmed. 534 F.3d 893.

After acknowledging a circuit split, the Eighth Circuit adopted the majority rule that time granted by a district court at a defendant's request for pretrial motion preparation is excludable under §3161(h)(1), even though pretrial preparation time does not fall within the scope of §3161(h)(1)'s specific provision for "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. §3161(h)(1)(D). The court reasoned that the phrase "including but not limited to" in §3161(h)(1) indicates that the particular time periods listed in subsections (A) through (J) are an illustrative rather than an exhaustive enumeration of those delays resulting from "other proceedings concerning the defendant." This construction eliminates a trap for trial judges, where accommodating a defendant's request for additional time to prepare pretrial motions could cause a speedy-trial case dismissal. Bloate contends that the Eight Circuit's interpretation violates the statute's plain text and reads the express limitation of §3161(h)(1)(D) out of the statute altogether. Subparagraph (D) excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." By its terms, the subparagraph does not exclude delay caused by the preparation of pretrial motions. And, argues Bloate, "[t]he fact that Congress did not intend to predict every application of §3161(h)(1) does not answer whether this particular delay is excludable." Bloate also argues that Congress specifically considered but rejected a proposal to exclude pretrial motion preparation time under §3161(h)(1).

● *Black v. United States, 08-876.* The principal question presented is whether an honest-services mail fraud conviction in a private corporate context requires the jury to find that the fraudulent scheme reasonably contemplated economic harm to those to whom the duty of honest services was owed. Conrad Black and his co-defendants, Boultbee, Atkinson and Kipnis, were senior executives in Hollinger International Inc., a newspaper company. Hollinger was controlled by a Canadian company, Ravelston, in which Black held a majority stake. Hollinger had a subsidiary called APC, which owned a number of newspapers that it was selling off. When only one paper was left, a weekly in Mammoth Lake, California, Kipnis drafted and signed, on behalf of APC, an agreement paying Black, Boultbee, and Radler (another Hollinger executive) $5.5 million in exchange for a promise not to compete with APC for three years after they left Hollinger. The checks making the payments were backdated to the year in which APC had sold most of its newspapers, allegedly to make the non-compete agreement appear more reasonable. Black and his co-defendants failed to notify either the Hollinger board of directors or its audit committee of the transaction, although the board was required to approve any transaction between a Hollinger executive and the company or its subsidiaries because of concerns about potential conflicts of interest. They also failed to disclose the payments in 10-K reports filed with the SEC, which led Hollinger to represent falsely to its shareholders that the payments were made to "satisfy a closing condition" of the sale of a newspaper. Black,

Boultbee, and Kipnis were charged with several counts of mail fraud, in violation of 18 U.S.C. §§1341 and 1346, among other charges. Section 1341 criminalizes the use of the mail system in furtherance of "any scheme or artifice to defraud"; §1346 defines "scheme or artifice to defraud" to include a scheme "to deprive another of the intangible right of honest services." The prosecution pursued two related theories — that Black and his co-defendants stole $5.5 million from Hollinger by fraudulently making bogus non-competition payments; and that by making the payments, they deprived Hollinger of their honest services as managers of the company.

In their defense, Black and the others claimed that the payments actually represented $5.5 million of management fees owed by Hollinger to Ravelston, which they had recharacterized as non-competition payments to exploit a loophole in Canadian tax law that exempted such payments from Canadian income tax. They argued that, because they were owed the money, there was no theft; and because the alleged scheme did not contemplate any economic harm to those who were owed a duty of loyalty, there was no deprivation of the right of honest services. Black, Boultbee, and Atkinson were convicted on three counts of mail fraud. On appeal, the Seventh Circuit upheld the convictions, rejecting the defendants' argument that a §1346 honest-services fraud conviction required that their private gain be at the expense of those to whom they owed the honest services; and holding in the alternative that even if the jury instruction was erroneous they had forfeited their right to challenge it by opposing the use of a special verdict form that would have established whether the jury convicted on the theft theory or the honest services theory. 530 F.3d 596.

Black notes that §1346 was passed in response to McNally v. United States, 483 U.S. 350 (1987), in which the Court rejected the "intangible rights" theory of mail fraud as void for vagueness. Black argues that §1346, however, did little to clarify the scope of honest services fraud; the legislative history shows only that it was intended to overturn McNally. Requiring the prosecution to show that a defendant intended or understood that his course of conduct would likely damage the economic interests of his employer is necessary, in Black's view, to prevent the conversion of every violation of corporate governance or company rules into a federal crime. Black also argues that the Seventh Circuit's forfeiture holding created an extra-textual requirement for preserving a claim of instructional error, not found in Federal Rule of Criminal Procedure 30(d), and which punishes defendants for exercising their right to object to special verdict forms. The United States responds that the statute's scope is sufficiently limited by a "materiality" requirement that "operates to constrict the scope of Section 346 in private-sector cases by distinguishing honest-service frauds that are properly actionable from those that are harmless and therefore do not warrant criminal prosecution." On the forfeiture issue, the United States argues that the concerns regarding special verdicts are not implicated in a case such as this where the special verdict would ask only which theory of mail fraud the jury was convicting on.

- *Weyhrauch v. United States, 08-1196.* The Court will decide "[w]hether, to convict

a state official for depriving the public of its right to honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law." Section 1341 criminalizes the use of the mail service to execute any part of a "scheme or artifice to defraud"; and §1346 defines "scheme or artifice to defraud" as including "a scheme or artifice to deprive another of the intangible right of honest services." Bruce Weyhrauch, an Alaska state legislator who had decided not to run for re-election, approached VECO, an oil services company with a significant stake in pending state oil tax legislation, looking for work after the end of his term in office. The Government alleges that he asked for future employment in exchange for voting the way VECO instructed on the oil tax legislation. He was indicted on multiple charges, including honest-services mail fraud in violation of §§1341 and 1346. Before trial, Weyhrauch moved to exclude evidence relating to his alleged duty to disclose conflicts of interest, arguing that Alaska state law did not require disclosure of employment negotiations or potential conflicts of interest. The district court granted the motion. On interlocutory appeal, the Ninth Circuit reversed, holding that Congress did not intend to condition the meaning of "honest services" on state law, and that Weyhrauch's alleged actions fell "comfortably within" the two categories of conduct traditionally understood to support honest-services mail fraud convictions without reference to state laws — bribe-taking and nondisclosure of material information. 548 F.3d 1237.

Weyhrauch argues that, for four reasons, §1346 does not mandate "the creation by the federal courts of a federal common law defining the disclosure obligations of state government officials." First, the Court is generally reluctant to expand the scope of federal common law, and has particularly resisted the notion of common law federal crimes. Second, the statute is constitutionally void for vagueness if the scope of honest services is not cabined by state law obligations. Third, the statute fails the clear statement rule, which requires a clear statement of congressional intent when an interpretation of a statute would upset the usual constitutional balance between the state and federal governments. Finally, Weyhrauch argues that interpreting §1346 not to require violation of state law is contrary to the rule of lenity. The Government responds that §1346 defines accepting bribes and fraud as "honest services" violations, that honest-services violations involving bribery or fraud do not require independent state law violations, and that nothing in the text of §1346 suggests that Congress intended to impose an additional state-law limit on violations involving nondisclosure. The Government also contends that the plain language of the statute refers to "the intangible right of honest services" not a "multiplicity of rights," supporting an inference that Congress intended the reach of the law to be uniform across the nation, rather than dependent on variable state-law requirements. Finally, the Government argues that §1346 was explicitly intended to overturn the Court's decision in McNally v. United States, 483 U.S.350 (1987), which held that §1341 was limited to "the protection of property rights," and rejected the "honest services" theory adopted by most circuit courts. Before McNally, the courts generally agreed that an independent state-law violation was not required for honest- services mail fraud. Because Congress clearly intended to restore the pre-McNally law when it enacted §1346, the Government argues, no state-law violation should be required now.

● *Salazar, Secretary of the Interior v. Buono, 08-472.* More than 70 years ago, the Veterans of Foreign Wars (VFW) erected a cross as a memorial to fallen service members in a remote area within what is now a federal preserve. In previous litigation filed by a private citizen in Oregon, the district court held that the presence of the cross on federal land violated the Establishment Clause. The district court permanently enjoined the federal government from permitting the display of the cross. Congress subsequently enacted legislation directing the Department of the Interior to transfer an acre of land, including the cross, to the VFW in exchange for a parcel of equal value. The district court then permanently enjoined the government from implementing that Act of Congress, reasoning that the government was still endorsing a particular religion while trying to evade the effects of the previous injunction. The Ninth Circuit affirmed, focusing on the govern-ment's continued control over the property and intent to further the maintenance of the cross on the land. 527 F.3d 758. The questions presented are: "(1) Whether respondent has standing to maintain this action where he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols. (2) Whether, even assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands."

The government argues that "Congress's decision to transfer an acre of land including the Sunrise Rock war memorial to the VFW was an eminently sensible and constitutionally permissible way of resolving any Establishment Clause problem presented by the continued display of the cross on federal land while, at the same time, avoiding the appearance of hostility toward either religion or the memorial to fallen service members." Moreover, argues the government, the plaintiff below did not have standing, as he did not object to the cross in general, but was only contending that such lands should be public forums for the display of other objects by other people. "[R]espondent has asserted only the ideological or legal objection that public lands on which crosses are displayed should also be open forums in which other people have the option of displaying other symbols." As such, under Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 565 (1982), that is not a cognizable injury for purposes of standing to bring an Establishment Clause challenge. The government further argues that the court of appeals erred in refusing to give effect to a reasoned Act of Congress, thereby requiring the removal of a 70-year-old memorial. Sale to a private party is a "sensible" way for government to remove any Establishment Clause problems.

Respondent counters that he has standing as an individual who has had to avoid "unwelcome exposure" to a religious symbol, or incur damage from exposure to such a symbol. He argues that the Court's standing inquiry should not look at his religious beliefs, for a Catholic could nonetheless object to the placement of a Christian religious symbol on government lands. In arguing that the Ninth Circuit's decision to invalidate the congressional act does not conflict with established First Amendment law, respondent further points out that the government's agreement with the VFW contained a reversionary

clause that "will likely influence the VFW's decisions about how it uses its property because maintaining the cross is the easiest and cheapest means of preventing reversion to the government." Thus, he argues that "the [reversionary] clause is one piece of information that would inform the reasonable observer's conclusion that the government is not, through the . . . land transfer, attempting to disassociate itself from a sectarian symbol."

● *United States v. Stevens, 08-769.* At issue is whether the federal animal cruelty law, 18 U.S.C. §48, is facially invalid under the Free Speech Clause of the First Amendment. Section 48 criminalizes the interstate trafficking of videos in which "a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place," and if the depiction does not have "serious religious, political, scientific, educational, journalistic, historical, or artistic value." Law enforcement bought videos from respondent Robert Stevens that depicted scenes of savage and bloody dog fights and of pit bulls viciously attacking other animals. The United States indicted Stevens on three counts of knowingly selling depictions of animal cruelty in violation of §48. Stevens moved to dismiss the indictment on First Amendment grounds, but the district court denied the motion. Following a jury trial, Stevens was convicted on all three counts and was sentenced to 37 months in prison. The Third Circuit, sitting en banc, invalidated the statute on its face and vacated Stevens' conviction. 533 F.3d 218.

The Third Circuit held that §48 is not akin to laws prohibiting possession and distribution of child pornography because the government's interest in preventing animal cruelty is not "of the same magnitude as protecting children" and there is no continuing harm to animals after a depiction of animal cruelty is captured on tape. The court also ruled that the exceptions clause cannot on its own constitutionalize §48 by exempting speech without any serious social value. The court therefore applied strict scrutiny to the statute and invalidated it on its face. The court presumed the statute was facially invalid because it is a content-based restriction on speech, repeated its view that the governmental interests are not compelling, and stated that the statute does not further the government's interests because it merely "aid[s] in the enforcement of an already comprehensive state and federal anti-animal-cruelty regime." The court also found that the statute is underinclusive (because it does not criminalize depictions of animal cruelty for personal use), and is overinclusive (because it covers depictions sold in places where the underlying conduct is illegal but made in places where the underlying conduct is legal).

The United States argues that the Third Circuit erred because Congress crafted §48 to apply only to a narrow and particularly harmful class of speech: depictions of unlawful acts of animal cruelty, done for commercial gain, that have no serious societal value. Like other forms of unprotected speech, such as fighting words, speech inciting unlawful activity, obscenity, and child pornography, depictions of the intentional infliction of animal suffering "do not have any redeeming expressive content." The United States further asserts that the Third Circuit erred in its weighing of the competing interests. "[S]ociety's understandably greater concern for children than for animals in no way detracts from the

fact that abuse of both is so antisocial that it has been made criminal" (internal quotation marks omitted). And, argues the United States, even if §48 covers some protected speech, the Third Circuit erred in invalidating the statute on its face. "[A] significant class of depictions prohibited by [§]48 can be constitutionally proscribed" — such as dogfighting videos and so-called "crush videos" that portray animal pain and suffering for human sexual arousal. As to such depictions, the statute serves compelling governmental interests: it "reinforces the prohibi-tions against animal cruelty in all 50 States and in federal law"; helps to prevent "the additional criminal conduct that is associated with gruesome images of the torture and mutilation of animals"; and furthers the "moral interest in suppressing depictions that have no social value and that are created solely to depict suffering by animals." The statute is narrowly tailored to meet those interests because it is difficult for police to detect and prosecute dogfighting rings and the filming of crush videos.

● *Perdue v. Kenny A., 08-970. The question presented is* whether an "attorney's fee award under a federal fee-shifting statute [may] be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation" used to determine the base award. Respondents are a class of children in foster care in two counties in Georgia. They sued the state and various state officials alleging both constitutional and statutory claims and requesting injunctive relief to improve administration of the state's foster care system. After extensive discovery, and consideration and denial of plaintiffs' motion for a preliminary injunction and defendants' motion to dismiss, the district court referred the parties to mediation. After months of negotiation, the parties reached a settlement agreement under which the defendants signed a consent decree that granted wide-ranging relief and changes in the foster-care system. There was no agreement on attorney's fees, however. Respondents' counsel requested an award of fees based on nearly 30,000 hours of work on the case, resulting in a lodestar calculation of more than $7 million, and an enhancement that would double the lodestar amount to more than $14 million. Defendants opposed the request, arguing that the lodestar was based on excessive hours and enhancement was not appropriate. The district court reduced the lodestar to just over $6 million, and then adjusted the award upward using a 1.75 multiplier. The court cited three reasons for the upward adjustment: the superior quality of the representation; the fact that counsel worked on a contingency fee basis; and "truly exceptional" results achieved. The Eleventh Circuit affirmed the award based on circuit precedent, though Judge Carnes' opinion argued that Supreme Court precedent dictated the opposite result. 532 F.3d 1209. The Eleventh Circuit denied rehearing en banc by a 9-3 vote, with Judge Carnes authoring a dissent from the denial for "the first time in sixteen years on the bench."

Georgia, in its petition, argues that the Supreme Court has not expressly resolved this issue, but that the Court's decisions strongly suggest that adjustments based on quality of performance and results obtained are impermissible. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Court held that the starting point for calculating attorney's fees under fee-shifting statutes is determining the "lodestar," i.e., multiplying "the number of hours

reasonably expended on the litigation" by "a reasonable hourly rate." The Court added that the lodestar calculation "does not end the inquiry" and that other considerations may lead to adjustments. And, stated the Court, an enhanced award may be justified "in some cases of exceptional success." In Blum v. Stenson, 465 U.S. 886 (1984), however, the Court rejected an enhanced award and ruled that factors such as "complexity of the issues," "quality of representation," and "results obtained" are "normally" or "generally" reflected in the two components of the lodestar calculation (number of hours billed and hourly rates). On the other hand, the Court rejected the argument "that an upward adjustment to an attorney's fee is never appropriate under [42 U.S.C.] §1988." In Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, 478 U.S. 546 (1986), the Court again held that "ordinarily" a fee award may not be increased based on the "superior quality" of the attorneys' performance. Lastly, in City of Burlington v. Dague, 505 U.S. 557 (1992), the Court held that the attorney's fee should not be enhanced merely because it was a contingent fee. In the course of that opinion, the Court again observed that the two lodestar factors normally subsume the risk of loss and difficulty of the case. Georgia argues that the Court has not yet resolved whether an attorney's fee may be enhanced based on results obtained or quality of performance, and that this has caused confusion in the lower courts. Respondents counter that district courts enjoy some discretion in awarding attorney's fees, and that the Court has repeatedly stated that upward adjustment based on superior performance is permissible in rare "exceptional" cases — a standard met here.

● *Pottawattamie County, Iowa v. Harrington, 08-1065. The question presented is "[w]*hether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly (1) violated a criminal defendant's 'substantive due process' rights by procuring false testimony during the criminal investigation and then (2) introduced that same testimony against the criminal defendant at trial." Two African-American teenagers, Terry Harrington and Curtis McGhee, were arrested, tried, and convicted of the murder of a white, former police captain n 1978. In 2003, the Iowa Supreme Court reversed the conviction of Harrington based on a Brady violation. McGhee, who was convicted essentially on the same evidence, entered an Alford plea in exchange for a sentence of time served. Both men then filed suit under 42 U.S.C. §1983 against former county prosecutors. The complaint alleged that the prosecutors played a significant role in the police investigation, conspired with the police to persuade a key witness to implicate Harrington and McGhee, introduced that false testimony at trial, and failed to turn over exculpatory evidence. The prosecutors moved for summary judgment, arguing that they were protected by both absolute and qualified immunity. The district court found that they enjoyed absolute immunity for the failure to turn over exculpatory evidence, but denied immunity for claims relating to the procurement of false testimony during the criminal investigation. The Eighth Circuit affirmed, holding that the procurement of false testimony "violates a [criminal defendant's] substantive due process rights," and that a prosecutor is not immune from suit for such a violation "where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial," resulting in a post-trial "deprivation of liberty." 547 F.3d 922.

Petitioners argue first that there is no clearly established constitutional right not to have prosecutors procure false testimony against you during a criminal investigation. Second, they argue that by making them liable for the plaintiffs' post-trial deprivation of liberty based on their role in the fabrication of evidence at the investigatory stage, the Eighth Circuit has effectively abrogated prosecutors' traditional absolute immunity for their actions at trial. The harm to Harrington and McGhee (and the damages that they might be entitled to) stem from the use of the false evidence at trial leading to their convictions, not to the manufacture of the evidence during the investigation. Harrington and McGhee point to Buckley v. Fitzsimmons, 509 U.S. 259, 276 (1993), which "held that prosecutors do not have absolute immunity during the investigative phase of a criminal proceeding." In their view, "the fact that the prosecutors later used the evidence in court did not cloak their involvement in fabricating that evidence during the investigation with absolute immunity."

● *Alvarez v. Smith, 08-351* . Under the Illinois Drug Arrest Forfeiture Procedure Act (DAFPA), law enforcement officials may seize personal property such as automobiles and money, without a warrant, if probable cause links the property to a drug crime. The questions presented are (1) whether the government must "provide a post-seizure probable cause hearing prior to the statutory judicial forfeiture proceedings" and (2) the appropriate standard for judging due process claims raised by the owners of seized property. Under DAFPA, once property is seized, law enforcement officials have 52 days to notify the state's attorney of the seizure. The state's attorney then has 45 days either to begin in rem forfeiture proceedings or notify the owner of possible forfeiture proceedings. As a result, forfeiture proceedings might not be initiated for up to 97 days after the initial seizure, and depending on the value of the property, may be delayed up to 187 days.

Pursuant to DAFPA, Chicago Police seized automobiles and cash from six persons (respondents here). Three of the persons were eventually charged with a crime; three were not. Each person's property was held for months before a forfeiture trial was held. The group filed a class action suit under 42 U.S.C. §1983 claiming that DAFPA violated the Due Process Clause because personal property owners are entitled to a "prompt, postseizure, probable cause hearing" before the actual forfeiture trial. Relying on Seventh Circuit precedent that judged such claims under the four-factor speedy trial analysis set forth in Barker v. Wingo, 407 U.S. 514 (1972), the district court rejected respondents' claim. The Seventh Circuit reversed. 524 F.3d 834. First, the court held that the three-factor due process analysis set forth in Matthews v. Eldridge, 424 U.S. 319 (1976), properly controls the issue, rather than Barker's speedy trial analysis. The court then held that "some sort of mechanism to test the validity of the retention of property is required." The court remanded back to the district court to craft "appropriate procedural relief," including a "hearing" that "should be prompt but need not be formal."

In her petition, the Cook County State Attorney argues that the Court — in post-Matthews cases — has held that the Barker speedy trial analysis controls due process claims concerning seized property. See United States v. $8,850, 461 U.S. 555 (1983);

United States v. Von Neumann, 474 U.S. 242 (1986). This is appropriate, the petition argues, because the "Matthews factors, unlike the Barker speedy trial factors, do not focus the inquiry on the delay in initiating the proceeding, the defendant's assertion of his right and prejudice to the defendant." In petitioner's view, under the speedy trial analysis embraced by $8,850 and Von Neumann, the Due Process Clause does not require "an interim post-seizure but pre-forfeiture hearing." Respondents counter that the Court applied Matthews to forfeiture proceedings in United States v. James Daniel Good Realty, 510 U.S. 43 (1993), a case involving the seizure of real property, and there is no basis to distinguish real and personal property in this context. Respondents further contend that $8,850 and Von Neumann dealt with a "very different issue — whether the claimants were entitled to dismissal of forfeiture actions due to pretrial delays."

● *United States v. Comstock, 08-1224.* At the issue is whether Congress has the authority to provide for court-ordered civil commitment of mentally ill, "sexually-dangerous" persons in federal custody who have either been found incompetent to stand trial or have been convicted but are nearing the end of their sentences. In 2006, Congress enacted 18 U.S.C. §4248 as part of the Adam Walsh Child Protection and Safety Act. The statute authorizes the federal government to seek civil commitment of persons in the custody of the Bureau of Prisons who are "sexually dangerous," i.e., who suffer from a mental illness that results in "serious difficulty in refraining from sexually violent conduct or child molestation if released." The standards for commitment were modeled after the standards approved by the Court in Kansas v. Hendricks, 521 U.S. 346 (1997), and Kansas v. Crane, 534 U.S. 407 (2002): they allow the district court to order a psychiatric examina-tion; require the Government to prove at a hearing by clear and convincing evidence that the inmate is a "sexually dangerous person"; provide counsel to the inmate; and allow the inmate to testify, present evidence, and subpoena, confront, and cross-examine witnesses. In this case, a number of federal prisoners who were due to be released, and one who was found incompetent to stand trial, offered a facial challenge to the constitutionality of §4248, moving to dismiss civil commitment proceedings initiated against them by the Government. The district court granted the motions to dismiss, holding §4248 unconstitutional. The Fourth Circuit affirmed, holding that §4248 is unconstitutional because Congress lacks the authority "to confine a person solely because of asserted 'sexual dangerousness' when the Government need not allege (let alone prove) that this 'dangerousness' violates any federal law." 551 F.3d 274.

The United States argues in its petition that it possesses a different relationship to persons in federal custody than to members of the general public, and that the ability to pursue civil commitment of persons in federal custody is "a rational incident" to its undisputed powers to enact criminal laws and imprison those who break them. It contends that it has a legitimate interest in protecting the public from persons already lawfully in federal custody, and that that interest is unaffected by whether the danger comes from conduct that constitutes a violation of federal law. The United States also contends that the statute involves only minimal intrusion on states' traditional sphere, noting the frequency of "supervised release" to show that former federal prisoners are rarely turned over to the

primary authority of the states on their release. Moreover, §4248 provides for continued federal custody of committed persons only when the states decline to take them. Respondents argue that §4248 cannot be justified as a "rational incident" to Congress' authority to enact criminal laws because it applies broadly to all persons in federal custody, not just those who have violated federal criminal law. Nor can §4248 be justified as a "rational incident" to the federal government's custodial responsibility for persons who violate its criminal laws because such custodial authority "necessarily ends" when the inmate is no longer lawfully in the custody of the Bureau of Prisons, for example, at the end of his sentence. Relying on the Court's recent Commerce Clause cases — United States v. Lopez, 514 U.S. 549 (1995), and United States v. Morrison, 529 U.S. 598 (2000) — respondents argue that §4248 is an attempt to regulate an activity that does not substantially affect interstate commerce and therefore exceeds Congress' authority under the Commerce Clause.